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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TRACE X CHEMICAL, INC.
AND JOHN F. ARENS

Petitioners,

v.

CANADIAN INDUSTRIES, LTD.,
C.I.L. AMMUNITION, INC.,
I.C.I. AMERICA, INC.,
AND IMPERIAL CHEMICAL INDUSTRIES, LTD.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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November 1984

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QUESTION PRESENTED

The question presented is whether specific, "predatory" or "unlawful" anti-competitive conduct is required to make out a violation of section 2 under the Sherman Act. (15 U.S.C. section 2)

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OPINIONS BELOW

The Opinion of the court of appeals (App. A) is reported at 738 F.2d 261 (8th Cir. 1984). The Order of the court of appeals denying petitioner Trace X's Petition for Rehearing en banc (App. C) is unreported. The judgment and order of the district court (App. B) denying respondents' Motions for a Judgment Notwithstanding the Verdict or for a New Trial, and granting petitioners' Motion for Trebled Damages and Costs and Reasonable Attorneys Fees, is unreported.

JURISDICTION

The Judgment of the court of appeals was entered on June 29, 1984. A timely Petition for Rehearing en banc was denied on August 16, 1984. (App. C) The jurisdiction of this court is invoked under 28 U.S.C. section 1254(1).

STATUTES AND RULE OF EVIDENCE INVOLVED

This case involves 15 U.S.C. Sections 1, reprinted in appendix D to this petition, 15 U.S.C. Section 2, reprinted in appendix E to this petition, 15 U.S.C. Section 15, reprinted in appendix F to this petition, 15 U.S.C. Section 17, reprinted in appendix G to this petition, 7 U.S.C. Section 291, reprinted in appendix H to this petition, and Federal Rule of Evidence No. 801(d)(2), reprinted in appendix I to this petition.

STATEMENT OF THE CASE

Respondent, CIL, is a large integrated chemical company. Majority interest and control of CIL rests with Imperial Chemical Industries, Ltd. (U.K.), one of the largest chemical companies in the world. CIL produces and markets many types of

commercial explosives, including trinitrotoluene (TNT), ammonium nitrate (A.N.), and cast TNT primers. During the period relevant to this case, at least twelve (12) other North American companies produced ammonium nitrate, however CIL, was and remained, the only producer of commercial TNT on the North American continent.

Trace X was a small U.S. company engaged in the manufacture and distribution of cast TNT primers for use in the mining industry. Because it employed a technically advanced manufacturing process, Trace X was able to make primers utilizing more TNT and less of a three times more expensive compound (PETN), and thereby enjoyed an advantage in the marketplace. By utilizing this advantage to consistently underprice its competitors, Trace X became the second largest manufacture of primers on the North American continent.

Production levels at Trace X increased from the rate of 1 million pounds per year in 1975, to over 5 million pounds in 1977. To accommodate this growth, Trace X, during late 1976 and early 1977, planned, designed and constructed an even more advanced production facility, Trace X also acquired the equipment, plans and operating manuals necessary to manufacture TNT in the United States at its Camden, Arkansas location. To meet the demand of its rapidy increasing sales, Trace X relied solely on CIL for supply of virgin TNT. On several occasions, TNT shortages caused Trace X to restrict production and/or shut down its operation. Because the Trace X primer was composed of approximately 95% TNT, the company was vitally concerned with the availability, quality, and price of commercial virgin TNT.

Trace X was one of CIL's largest U.S.

customers in early 1976 when CIL first discovered that Trace X was intending to manufacture its own TNT in direct competition with CIL. Trace X had been given credit terms of payment due 30 days from invoice with the balance of its purchases of TNT backed by Gulf Oil Company (Trace X's major customer).

On October 9, 1976, for no revealed reason, CIL cancelled all credit terms and required cash in advance from Trace X. CIL demanded that Trace X pay for shipments received, but for which Trace X had not been invoiced. These actions were taken by CIL despite the fact that Trace X had never been late on an invoice payment. In fact, at the time CIL owed Trace X $154,000.00 for primers CIL had purchased from Trace X. CIL threatened to stop selling TNT to Trace X even on a cash basis unless Trace X agreed to CIL's demands. CIL stated that Trace X's competitive practices were

disrupting the U.S. market and Trace X should raise prices.

In August of 1976, CIL shipped over 107,000 pounds of defective TNT to Trace X. Trace X, believing that the TNT was good, used it to manufacture cast primers and sold the primers to its various customers. The primers made from the defective TNT failed in field application and in late September, 1976 Trace X received complaints of misfires from its customers.

CIL's major customer, the Iron Ore Company of Canada, encountered misfires using a TNT slurry and Trace X primers both made with the defective TNT. CIL received notice that other customers thought that the TNT was defective and a CIL employee admitted that in CIL's own tests, the TNT failed to meet minimum specifications. CIL did not notify Trace X of the reports that they had received prior to October 9, 1976

from their customers, but instead CIL cancelled Trace X's credit and made Trace X pay for the defective TNT even before invoicing, thus depleting Trace X's operating capitol. The primers made from the defective TNT, which failed in field application, were returned to Trace X for credit or replacement by its customers.

In March, 1977, CIL notified Trace X that it was returning 51,000 pounds of primers made with the defective TNT. Shortly thereafter Trace X arranged a meeting in Montreal with CIL representatives to discuss the exchange of the substandard TNT. Prior to the meeting, CIL's export sales manager stated, "Trace X would have a lot better time at the meeting tomorrow if CIL had some understanding that Trace X was going to be raising its prices and not going into the manufacture of TNT." Trace X refused. At the meeting CIL stated that CIL would not replace the TNT because

"if we exchange the TNT, you (Trace X) will just use your profits to compete against us in the manufacture of TNT." At trial, one of CIL's employees admitted that the normal, reasonable commercial practice would have been to exchange or refund the defective TNT for Trace X.

After the Montreal meeting, Trace X was forced to stop manufacturing its primers and to seek a buyer for its equipment and other major assets. Trace X's decision came after much consideration and was an effort to avoid bankruptcy. Trace X had over 107,000 pounds of contaminated TNT from CIL in inventory. CIL had announced to Trace X that the substandard TNT would not be replaced because CIL wanted to eliminate Trace X as a probable threat to its North American TNT monopoly.

By April of 1977, Trace X discovered that CIL had covered up the IOC failures

and was claiming credit on 51,000 pounds of defective primers. Trace X had already suffered $334,000.00 in damage as a result of processing and handling the defective TNT. When Trace X finally became aware of the events that transpired in October of 1976, Trace X was without a reliable and fair supplier of TNT, had suffered from a weakened financial position, and had no choice except to shut its doors in an attempt to mitigate its damages.

Prior to this action, petitioner Trace X sued respondent for breach of warranty. In that case it was found that the 107,000 pounds of TNT, that CIL had shipped to Trace X, had in fact been defective, and had damaged Trace X. (Trace X Chemical, Inc. v. Gulf Oil Chemical, Co., No. 78-5010, (W.D. Ark. 1982), aff'd, 724 F.2d 68 (8th Cir. 1983).)

Trial in this case commenced on

February 28, 1983. The case was submitted to the jury by agreement on a general verdict on the claim that CIL engaged in anticompetitive conduct in furtherance of its monopoly, or in an attempt to monopolize, which conduct proximately injured Trace X, in violation of Section 2 of the Sherman Act, 15 U.S.C. section 2. A general verdict in favor of Trace X was returned on March 4, 1983, pursuant to Section 4 of the Clayton Act, 15 U.S.C. section 15, the district court on motion of petitioner, trebled the award. The district court also denied respondent CIL's post trial motions for judgment notwithstanding the verdict or in the alternative for a new trial. (See Appendix A) CIL appealed from the judgment of the district court on the grounds that there was insufficient evidence of anticompetitive conduct on its part or that it had caused the injury to Trace X's

business. Other issues were presented by respondent on appeal, but the Eighth Circuit panel did not reach those issues.

The Eighth Circuit court in its opinion noted that, "CIL does not contest the fact that it has a monopoly in the TNT market. CIL also does not contest the element of anticompetitive intent, but rather argues that even if CIL were found to have an anticompetitive intent, that would not, in the absence of anticompetitive, monopolistic conduct, amount to a violation of Section 2 of the Sherman Act." (See Appendix B, footnote 1 of Eighth Circuit panel decision)

The Eighth Circuit court of appeals considered and accepted CIL's contention that their conduct of cancellation of Trace X's credit and refusal to refund or replace the defective TNT that they had shipped to Trace X, was nothing other than ordinary

commercial conduct, and that the intent to exclude competition coupled with the expected anticompetitive result of putting Trace X out of business, would not convert otherwise ordinary commercially reasonable conduct into "predatory or unlawful anticompetitive conduct."

The Eighth Circuit panel characterized the admissions by CIL's employees as hearsay, then stated that even if it is assumed that proof of these statements supports an inference of anticompetitive intent on the part of CIL, this is not enough to transform CIL's otherwise legitimate business activities into anticompetitive, monopolistic conduct. The court then stated that there was insufficient evidence as a matter of law to support the verdict and it reversed the judgment of the district court.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in rder to maintain the consistent pplication of the decisions of this Court, nd to eliminate the conflict of decisions mong the courts of appeals.

I.

The Court of Appeals' Decision Is In Conflict With The Decisions Of This Court

he Eighth Circuit panel in the decision elow, required petitioner to show specific predatory or unlawful anti-competitive onduct" in order to sustain a general jury erdict of monopolization and/or attempted onopolization.

Section 2 of the Sherman Act has been onsidered and applied by this Court in a ong line of cases. Justice White, writing or the majority in Hanover Shoe, Inc. v. nited Shoe Machinery Corp., 392 U.S. 481

(1968) concluded that; "these cases make it clear that there was (sic) no accepted interpretation of the Sherman Act which conditioned a finding of monopolization under section 2 upon a showing of predatory practices by the monopolist." Id at 497-98. "Actions which will show monopolization are not 'limited to maneuvers not honestly industrial'". Id., at 496, quoting United States v. Swift and Co., 286 U.S. 106, 116 (1932). This Court in American Tobacco Co. v. United States, 328 U.S. 781 (1946), stated, "It is not the form of the combination or the particular means used but the result to be achieved that the Statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful." 328 U.S., at 809. In American Tobacco, this Court also endorsed the decision of the Second Circuit court of appeals, written by Chief

Judge L. Hand, in United States v. Aluminum Company of America, 148 F.2d 416, 431-32 (2nd Cir. 1945),

> "Only in case we interprete 'exclusion' as limited to maneuvers not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exculsionary'. So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent. ... In order to fall within Section 2, the monopolist must have both the power to monopolize and the intent to monopolize. To read the passage as demanding any "specific", intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing. So here, "Alcoa" meant to keep, and did keep that complete and exclusive hold upon the ingot market with which it started. That was to "monopolize" that market, however innocently it otherwise proceeded. So far as the judgment held that it was not within Section 2, it must be reversed."

In this case it is undisputed that respondent CIL has a monopoly in the manufacture of TNT and that Trace X had purchased the necessary manufacturing equipment to compete with CIL as a TNT

manufacturer, and that Trace X did compete with CIL in the TNT primer market. It is also not disputed that CIL cancelled Trace X's credit terms, and refused to exchange the defective TNT that it had sent to Trace X. These acts were undertaken by CIL with acknowledged concurrent anti-competitive intent.

The Eighth Circuit panel below, in arriving at its determination that there was insufficient evidence to support a general jury verdict of monopolization and/or attempted monopolization, separated the several incidences of CIL's harmful conduct and then separated each from the evidence of CIL's mal intent and thereby concluded that the practices complained of were of an "ordinary commercial" nature. This method of analysis is at odds with the opinion of Justice White in Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S.690, 699 (1962), where it was stated

that, " In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each... the character and effect of a [monopolist's conduct] are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." Ibid., quoting United States v. Patten, 226 U.S. 525, 544 (1913).

The Eighth Circuit Court in this case employs an erroneous legal construction in terms of its analysis of anti-competitive intent, vis-a-vis anti-competitive conduct, by first characterizing respondent CIL's conduct as "ordinary commercial conduct", and only then analyzing CIL's intent. By separating conduct from intent and by characterizing the statements of CIL's officers as hearsay, the Court concludes that even if the statements were proof of

intent, intent alone is not enough to transform CIL's otherwise legitimate business activities into anti-competitive monopolistic conduct. This result goes against this Court's statement in United States v. Griffith, 334 U.S. 100, 107 (1947), that, "It follows a fortiori that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."

In enacting the Sherman Act, Congress clearly intended to prevent monopolies and restraint of trade and to proscribe the use of monopoly power by any means, whether lawful or not, to achieve or maintain monopoly position. Moreover, the decision below will frustrate the proper use of Federal Rule of Evidence No. 801(d)(2), which says that admissions of a party opponent introduced into evidence by a party to the litigation are not hearsay,

but are to be admitted "as substantial evidence of the fact stated", i.e. of predatory conduct as well as of anticompetitive intent. United States v. Cline, 570 F.2d 731, 735-36 (8th Cir. 1978); United States v. Porter, 544 F.2d 936, 938-39 (8th Cir. 1976)

By viewing first the conduct (i.e. refusal to exchange defective TNT and cancellation of credit), and then labeling it "commercially reasonable", and then looking at CIL's intent while placing minimum emphasis on the admissinos of CIL's officers, the Eighth Circuit Court did to petitioner Trace X's proof of CIL's anti-competitive conduct and intent precisely what this Court said should not be done in Continental Ore, supra, where this Court dealt with just such an issue.

Petitioner Trace X did not rely solely on the above statements to prove conduct or

intent, but in fact put on over three days of testimony including over 150 exhibits in order to make its case of monopolization against CIL, as opposed to only one-half day of rebuttal by CIL. Respondent CIL offered no proof that its monopoly was the consequence of a superior product, business acumen, or historic accident as distinguished from wilful acquisition or maintenance. (See United States v. Grinnell Corp.. supra 384 U.S. at 570-71.

The opinion rendered by the Circuit panel below has the effect of applying to general anti-trust cases the more restrictive standards of monopolization which heretofor have applied only to agricultural cooperatives under the Capper-Volstead Act. (See Fairdale Farms, infra; also see Opinion of the Eighth Circuit court of appeals at App. B.)

II.

The Court Of Appeals' Decision Is In Conflict With The Decisions Of The Courts Of Appeals Of Other Circuits

The court of appeals has decided an important question regarding what evidence is necessary to uphold a general jury verdict of monopolization or attempted monopolization under Section 2 of the Sherman Act, Its decision that predatory or unlawful conduct is required to show a violation of Section 2 is squarely in conflict with the decisions of other federal courts of appeal. In contrast to the decision below, the Second, Ninth, Tenth and the District of Columbia Circuits do not require a showing of unlawful or predatory conduct by the monopolist in order to support a finding of monopolization or maintenance of a monopoly in violation of Section 2 of the Sherman Act. Once, as has been done by petitioner

in this case, it has been shown that a monopolist has the power to monopolize and the intent to monopolize, and that they in fact achieved or maintained that monopoly position through use of their power, however innocently it otherwise proceeded, a Section 2 violation of the Sherman Act has been made out. United States v. Aluminum Company of America, 148 F.2d 416, 432 (2nd Cir. 1945). (Hereafter referred to as Alcoa)

The Second Circuit further held in Alcoa that once a monopoly is shown to exist, the actions of the monopolist fall within Section 2 of the Sherman Act if the monopolist has both the power and the intent to monopolize. The intent required is not specific but is general: the intent to keep complete and exclusive hold on the market with which is started. The actual accomplishment of that goal need not be by illegal or otherwise improper means. Once

that object of monopolization is achieved or maintained, however innocently it otherwise proceeded, a violation of Section 2 is made out. Ibid.

The Eighth Circuit holding below also is in conflict with and misapplies the decisions of the Second Circuit court of appeals in the case of Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037 (2nd Cir. 1980), cert denied, 454 U.S. 818, (1981) 715 F.2d 30 (1983), cert denied, ___ U.S. ___ (1984), (hereinafter referred to as "Fairdale Farms" when it excludes the monopolistic practices of respondent CIL from the sanctions of Section 2 of the Sherman Act in the case below. Fairdale Farms dealt with an entirely different situation, in which an agricultural cooperative association's threat to stop selling its products to a customer was held not to be a predatory practice. The cooperative was protected by the

Capper-Volstead Act, 7 U.S.C. sections 291-92, which permit monopoly power of agricultural cooperatives to fix prices and exclude competition and exempts this conduct except in certain instances from application of the Sherman Act. The Second Circuit court in Fairdale Farms held that the normal test of sufficiency of a claim of monopolization was controlled by United States v. Grinnell Corp., 384 U.S. 563, (1966): A claim under Section 2 is made out if the plaintiff establishes, "(1) the possession of monopoly power in the relevant market and (2) the wilfull acquisition or maintenance of that power as distinquished from growth or development as a consequence of a superior product, business acumen or historical accident." 715 F.2d at 31, quoting Grinnell, supra, 384 U.S. at 570-71. The Second Circuit court of appeals then pointed out that, "the effect of the Capper-Volstead Act, 7

U.S.C. sections 291-92, "is to prevent the full application of the second element of this test to agricultural cooperatives," so that the acquisition, maintenance or exercise of monopoly power, by "predatory means" only was proscribed." Fairdale Farms, supra, 715 F.2d, at 31, quoting 635 F.2d, at 1045. In addition, the Second Circuit court's holding in Fairdale Farms is not applicable to the case below in that the agricultural cooperative in Fairdale Farms did not have a monopoly covering the entire applicable market, and the customer had other sources of supply available. The Eighth Circuit's use of the decision in Fairdale Farms to protect the wilfull acquisition or use of monopoly power by CIL simply because its practices were not "predatory" only frustrates the intent of Congress and misapplies the Capper-Volstead Act as well as the Sherman Act, and the decisions of the Second Circuit court of

appeals.

The decision below is in conflict with decisions of the court of appeals for the Ninth Circuit, which has held that a prima facie case of violation of the Sherman Act has been established when the complaintant shows that an entity with monopoly power in the relevant market employs exclusionary tactics to maintain its monopoly hold over that market. Direct evidence that the complained of conduct did occur and that it restricted competition in the market, is sufficient. Greyhound Computer Corp., Inc. v. International Business Machines Corp., 559 F.2d 488, 503 (9th Cir. 1977), cert. denied 434 U.S. 1040, (1978). In Greyhound, the Ninth Circuit stated, "it is no answer to the charge to say that these practices [used] are not "predatory" but "honestly industrial" - that is, of a kind an ordinary enterprise might utilize with impunity. If the jury concluded IBM

possessed monopoly power in the leasing of General Purpose Computers, IBM would be precluded from employing otherwise lawful practices that unnecessarily excluded competition from the submarket. The question is whether the jury could have found that the alleged practices were in fact adopted, and, if so, whether they had the prohibited effect." 559 F.2d, at 498, quoting Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 497-98, (1968), American Tobacco Co. v. United States, 328 U.S. 781, 814, (1946), and Alcoa, supra, 148 F.2d at 431, and citing United States v. United Shoe Machinery Corp., 110 F.Supp. 295, 344-45 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521, (1954).

The decision below is in conflict with the decision of the court of appeals for the District of Columbia Circuit in Hecht v. Pro Football, Inc., 187 App. D.C. 73,

570 F.2d 982 (D.C. Cir. 1977), cert. denied, 436 U.S. 956, (1978). In Hecht, the District of Columbia Circuit court analyzed many of the cases brought under Section 2 of the Sherman Act in district, and Circuit courts of appeals, as well as in this Court. There, the District of Columbia Circuit Court stated that: "the offense of monopolization under Sherman Act, Section 2 implicates both the possession of monopoly power, monopoly in the concrete - and an element of wilfullness or intent. To demonstrate intent to monopolize, however, a plaintiff need not always prove that the defendant acquired or maintained his monopoly power by means of exclusionary, unfair, or predatory acts. At least since Alcoa, it has been clear that the requisite intent can be inferred if a defendant maintains his power by conscious and wilful business policies, however legal, that inevitably result in the exclusion or

limitation of actual or potential competition. (570 F.2d at 990, quoting Standard Oil Co. v. United States, 221 U.S. 1, 62, (1911)). ...it is the clear thrust of Alcoa that, once a plaintiff has proved the defendant's maintenance of a monopoly power through conscious business practices, a rebuttable presumption is established that defendant has the requisite intent to monopolize. The defendant can defeat this presumption by showing that it had monopoly, as some have greatness, thrust upon it - that its power derives from superior skill, foresight and industry or from the advantages of natural monopoly conditions. Both the Supreme Court and the lower courts have echoed this position." Id., at 991. The court in Hecht held that once a plaintiff has proven the defendant's maintenance of its monopoly power through conscious business practices, a rebuttable presumption is established

that defendant has the requisite intent to monopolize and the defendant then bears the burden of proof in avoiding the charge of monopolization. The court also pointed out that whether a restraint of trade is unreasonable depends on its effect, whether it has a substantially adverse effect on competition, whether it promotes or suppresses or destroys competition. Id., at 991, 995-96.

Conclusion

This court has continually supported the principle that when the object (i.e. a monopolist hindering or destroying competition with intent to do so) is forbidden by Section 2 of the Sherman Act the means employed to attain it are unlawful under Section 2 even if those means are wholly, innocent and lawful in themselves. American Tobacco Co. v.

United States, 328 U.S. 781, 90 L.Ed. 1575, 66 S.Ct. 1125 (1946).

In the present case, respondent CIL does not contest the fact that it holds a monopoly in its market, nor that it harbored an exclusionary intent in its dealings toward petitioner Trace X. The effect of CIL's use of its monopoly power was to suppress and destroy its competitor Trace X.

These considerations counsel strongly for finding that petitioner Trace X did carry its burden of showing a violation of Section 2 of the Sherman Act and that there was sufficient evidence on which the jury could base its verdict that respondent CIL engaged in monopolistic practices in violation of Section 2.

Petitioner has been damaged and driven out of business by a monopolist, who admits having the intent to exclude Trace X from

its competition. It would be ironic indeed that respondent CIL would be effectively entitled to remain free of competition unless petitioner proved that CIL's conduct was per se "unlawful" or "predatory."

The Eighth Circuit in the decision below has done away with or reversed the presumption which would have worked in petitioners favor, and has placed on petitioner the burden of proving the special requirement of predatory or unlawful conduct heretofore applicable only to agricultural cooperatives.

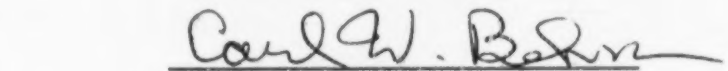
In reaching its determination that Trace X had not shown by a preponderance of the evidence that CIL had engaged in anti-competitive monopolistic conduct, the court separated the evidence of CIL's exclusionary conduct from the admitted facts of its monopoly position in the market, and its intent to suppress and

exclude competition by Trace X; the court then applied to CIL the Capper-Volstead Act exclusion from the Sherman Act which requires a showing of specific predatory or unlawful conduct to make out a violation of Section 2 of the Sherman Act.

The court stated that CIL's conduct was not predatory or unlawful anti-competitive conduct, because Trace X was in poor financial condition and had not paid CIL for the defective TNT (even though CIL intentionally brought this condition about.) The court also discounted as hearsay the admissions of party defendant CIL's officers that they were refusing to deal and to exchange defective TNT with Trace X because Trace X would use its profits to compete with CIL, rather than considering such statements as substantial evidence of the truth of the matter asserted (i.e. as proof of predatory conduct as well as intent.)

To allow the decision of the Eighth Circuit court of appeals to stand would frustrate the intent of Congress, would erffectively prevent application of the Sherman Act in a large number of cases, and would misapply the exclusions of the Capper-Volstead Act to general anti-trust cases.

Respectfully Submitted,
TRACE X CHEMICAL, INC.



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November 13, 1984

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 83-1847

Trace X Chemical, Inc.
and John F. Arens,
Appellees,

Appeal from the United States District Court for the Western District of Arkansas

vs.

Canadian Industries, Ltd.,
C.I.L. Ammunition, Inc.,
I.C.I. America, Inc., and
Imperial Chemical Industries,
Ltd.,
Appellants.

Submitted: December 15, 1983

Filed: June 29, 1984

Before McMILLIAN, JOHN R. GIBSON,
and BOWMAN, Circuit Judges.

JOHN R. GIBSON, Circuit Judge

Canadian Industries, Ltd., and CIL Ammunition, Inc., appeal from a judgmentin favor of Trace X Chemicals, Inc., and John F. Arens on their claim against the CIL group under Section 2 of the Sherman Act, 15 U.S.C. section 2 (1982). Following the jury verdict of $500,000, the district court trebled the award pursuant to Section 4 of the Clayton Act, 15 U.S.C. section 15 (1982). CIL's motions for judgment notwithstanding the verdict and for a new trial were denied. Trace X manufactured and distributed cast TNT primers for use in the mining industry. CIL manufactured TNT and was the principal source of TNT for Trace X. Arens, Trace X's president,

claimed that Trace X was forced out of business by CIL's anti-competitive conduct, particularly CIL's refusal of credit and its failure to replace allegedly defective TNT. CIL appeals from the judgment on the grounds that (1) there was insufficient evidence of any anti-competitive conduct on its part or that CIL caused the shutdown of Trace X's business, (2) the district court erred in admitting irrelevant, prejudicial documents, and (3) Trace X failed to adequately prove its damages. For the reasons stated below, we reverse.

I.

When Trace X first began to buy TNT from CIL, it did so through Gulf Oil Company, Trace X's principal customer. This arrangement permitted Trace X to use Gulf's credit. Trace X had not provided the financial information required by CIL's credit section; therefore, any direct

purchases by Trace X were to be paid by cash or certified check.

In April, 1976, CIL's credit section authorized Trace X to make direct purchase on thirty days credit, up to a limit of $16,000 -- the cost of one truckload of TNT. If Trace X ordered more than one load in a month, it would have to pay for each load before receiving the next. If the order went through Gulf, however, CIL would extent unlimited credit.

To meet the demand of its rapidly increasing sales, Trace X relied solely on CIL for its supply of TNT. Since the Trace X primer was composed of approximately 95 percent TNT, Trace X was vitally concerned with the availability, quality, and price of TNT. Because of Trace X's ever-increasing need for TNT, Arens became interested in manufacturing TNT. In February, 1976, he contacted CIL about its

patented continuous-process method for making TNT, and CIL offered to license its process at a cost of $3,500,000. Instead, in late 1976, Arens purchased the equipment and blueprints of a military batch-process TNT plant in Childersburg, Alabama. Arens planned to reconstruct the plant in Arkansas and operate it there. Trace X prepared a prospectus for potential investors in its TNT manufacturing process. By March, 1977, Trace X had commitments for investment only from Arens and Szaloczi, vice president of Trace X. No contracts or commitments had been made by any customer other than Trace X itself.

From April through September, 1976, CIL's deliveries of TNT to Trace X increased steadily. CIL billed Gulf for almost all of Trace X's purchases during this period, but Gulf refused to pay, stating that Trace X was responsible for the purchases. After totalling the amount

due on all these purchases and subtracting the amount owed by CIL to Trace X for primers, Trace X owed CIL $160,000, an amount far beyond Trace X's credit limit of $16,000.

To settle this account CIL met with Arens in October of 1976. Arens argued that according to Trace X's accounts, CIL owed Trace X rather than Trace X owing CIL because Trace X had received no invoices from CIL, while Trace X invoices to CIL for primers remained unpaid. CIL threatened to stop shipping TNT to Trace X if arrangements were not made to pay for the TNT that Trace X had received. After negotiating, Trace X agreed to pay CIL the $160,000 over a ten-week period. Arens also gave CIL his personal guarantee. CIL agreed to ship 40,000 pounds of TNT a week for ten weeks to Trace X and reaffirmed its commitment to supply all of Trace X's TNT requirements subject to availability. CIL

insisted that future purchases be cash in advance. In February, 1977, CIL gave Trace X the further written assurance that it would supply 100,000 pounds of TNT per week thereafter.

In September of 1976 come of Trace X's customers complained that primers were misfiring. Trace X took back the faulty primers, gave its customers credit, and made and shipped them new primers. Arens told CIL that primers manufactured by Trace X had been failing and that tests conducted by Trace X showed that the TNT was at fault. CIL disputed this and refused to replace the TNT. CIL maintained that it was Trace X's manufacturing process, rather than defective TNT, that had caused the primer misfires.

In March, 1977, Trace X again asked for credit, presenting financial statements for the year ending September, 1976. CIL's

credit section again declined to grant credit, stating that it would reconsider if provided with current, audited information for the six months from October, 1976, through March, 1977.

Arens shut down Trace X's primer business and decided to abandon its TNT project in March, 1977. According to Arens he was forced to shut down because CIL refused to extend credit to Trace X and would not replace the allegedly defective TNT. At the meeting in late March when Arens again asked CIL to replace the TNT, Ingham, CIL's marketing manager responded: "Why would we do that? If we exchange the TNT, you will just use your profits to compete against us in the manufacture of TNT."

II.

By a general verdict the jury found that CIL violated Section 2 of the Sherman Act

by monopolizing interstate commerce and by attempting to monopolize interstate commerce. Our scope of review of a jury verdict is limited. Roesch, Inc. v. Star Cooler Corp., 712 F.2d 1235, 1237 (8th Cir. 1983), cert. denied, 104 S.Ct. 1707 (1984) (en banc). We must consider the evidence in the light most favorable to Trace X and give it the benefit of all legitimate inferences. Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 696 (1962); Roesch, Inc., 712 F.2d at 1237; J&J Farms, Inc. v. Cargill, Inc., 693 F.2d 830, 834-35 (8th Cir. 1982). But the jury's fact finding power is not without limit. When the evidence leaves no room for a reasonable difference of opinion as to the proper resolution of the case, it should be decided by the court as a matter of law. Roesch, Inc. v. Star Cooler Corp., 671 F.2d 1168, 1171 (8th Cir. 1982), aff'd by an equally divided court, 712 F.2d

1235 (8th Cir. 1983); Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 883 (8th Cir. 1978).

III.

The elements of an attempted monopolization claim under Section 2 of the Sherman Act are as follows: (1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anti-competitive conduct directed to accomplishing the unlawful purposes; and (3) a dangerous probability of success. Inglis v. ITT Continental Baking Co. 668 F.2d 1014, 1027 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 270 (7th Cir. 1981), cert. denied, 455 U.S. 921 (1982); Blair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d 665, 669 (9th Cir. 1980).

To establish monopoliztion in violation

of Section 2 it must be shown that CIL: (1) possessed monopoly power in the relevant market, and (2) used its monopoly power to foreclose competition, gain a competitive advantage, or destroy a competitor. United States v. Griffith, Inc., 334 U.S. 100, 107 (1948); Paschall v. Kansas City Star Co., 727 F.2d 692, 696 (8th Cir. 1984) (en banc); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275-76 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

Although at trial CIL contested every element of both claims, only the element of anti-competitive conduct or the use of monopoly power is at issue on

ppeal.[1] To prove a violation of Section 2 nder the Sherman Act, whether based on a laim of attempted monopolization or actual onopolization, it must be shown that CIL ngaged in anti-competitive behavior. As xplained by the court in Northeastern Tel. o. v. American Tel. & Tel. Co., 651 F.2d 6 (2d Cir. 1981), cert. denied, 455 U.S. 43 (1982), a mere showing of monopoly ower unaccompanied by evidence of nti-competitive behavior is insufficient o support a claim for monopolization. herefore, a conclusion that CIL's ctivities were not anti-competitive would bsolve it of liability under both claims.

. For purposes of this appeal, CIL does ot contest the fact that it has a monopoly n the TNT market. CIL also does not ontest the element of anti-competitive ntent, but rather argues that even if CIL ere found to have had an anti-competitive ntent, that would not, in the absence of nti-competitive, monopolistic conduct, mount to a violation of Section 2 of the herman Act.

651 F.2d at 85. These general principles were outlined in the district court's charge to the jury.

According to Trace X, CIL engaged in monopolistic conduct with the intent and effect of driving Trace X out of business. Specifically, Trace X contends that CIL's refusal to extend credit or replace the defective TNT constituted anti-competitive, monopolistic conduct. CIL maintains, however, that its denial of credit and its refusal to replace the TNT were acts of ordinary commercial conduct.

Acts which would constitute an unlawful use of monopoly power are those "derived from [the monopolist's] power in the market or its size,... acts which could only have been performed by one with the requisite power." Telex Corp. v. IBM, 510 F.2d 894, 926 (10th Cir.), cert. dismissed, 423 U.S. 802 (1975). See, Northeastern Tel. Co., 651

F.2d at 92; Berkey Photo, 603 F.2d at 275. Anti-competitive conduct is conduct without legitimate business purpose. Becker v. Egypt News Co., 713 F.2d 363, 366 (8th Cir. 1983); Inglis, 668 F.2d at 1030-31. Such conduct makes sense only because it eliminates competition. Id. Acts which are ordinary business practices typical of those used in a competitive market do not constitute anti-competitive conduct violative of Section 2. Telex Corp., 510 F.2d at 925-26. The exercise of business judgment cannot be found to be anti-competitive. To be labeled anti-competitive, the conduct involved must be such that its "anticipated benefits were dependent upon its tendency to discipline or eliminate competition and thereby enhance the firm's long term ability to reap the benefits of monopoly power." Inglis, 668 F.2d at 1030.

Since a general verdict was returned

against CIL, we must conclude that the jury considered the elements which constitute an antitrust violation, as properly instructed by the district court, and found that CIL had engaged in anticompetitive, monopolistic conduct. After a careful study of these records, however, we conclude that there is insufficient evidence as a matter of law to support such a finding. CIL's refusal to extend credit or replace the TNT were not invalid uses of monopoly power, but were, under the circumstances, ordinary business practices.

Our reading of the evidence does not reveal material conflicts in the facts. Insofar as there are differences in the testimony, they simply do not reach the essential antitrust issues presented. CIL presented uncontradicted evidence that Trace X's parent company was in bankruptcy and that Trace X had refused to supply Dun

& Bradstreet with financial information. In addition, Trace X's auditors declined to give an opinion on Trace X's 1976 statement of earnings, and Trace X had been unable to secure credit from other sources. CIL's denial of credit to Trace X under these circumstances cannot be considered an unlawful use of monopoly power. See, Blair Foods, Inc., 610 F.2d at 671-72. On the basis of the evidence presented, CIL's refusal to extend credit did not amount to unreasonable anti-competitive conduct, but rather constituted a valid exercise of business judgment. See Becker, 713 F.2d at 366; see also Paschall, 727 F.2d at 697; Paschall v., Kansas City Star, 695 F.2d 322, 339-40 (8th Cir. 1982) Henley, J., dissenting. It is certainly not conduct that is "possible or effective only if taken by a firm that dominates its smaller rivals." Berkey Photo, 603 F.2d at 275. In support of its claim of anti-competitive

conduct, Trace X argues that CIL threatened to discontinue supplying it with TNT unless Trace X paid for the $160,000 worth of TNT received but not paid for by Trace X.[2] However, terminating or threatening to terminate deliveries to a purchaser who refuses to provide full payment is not predatory or unlawful anti-competitive conduct. Fairdale Farms, Inc. v., Yankee Milk, Inc., 715 F.2d 30, 34 (2d Cir. 1983), cert. denied, 104 S.Ct. 711 (1984).

This case does not involve a refusal to deal. CIL was willing to continue to supply Trace X with TNT; it merely refused to deal with Trace X on other than a cash basis. "Section 2 of the Sherman Act does not give purchasers the exclusive right to dictate the terms on which they will

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2. In his testimony Arens admitted that Trace X did owe CIL the $160,000 for the TNT it had received.

deal." Fairdale Farms, 715 F.2d at 34, nor does it require a monopolist to accede to every demand of its competitors or customers. Glen Eden Hospital v. Blue Cross & Blue Shield, 555 F.Supp. 337, 345 (E.D. Mich. 1983)

A careful study of the evidence also reveals nothing from which a jury could reasonably conclude that CIL's refusal to replace the defective TNT was anything other than ordinary commercial conduct. As long as he is acting in good faith, a seller does not lose the right to contest a customer's claim simply by having monopoly power. Even though a jury in a breach of warranty action later found that the TNT

vas defective,[3] there is no evidence in the record to support Trace X's suggestion that CIL deliberately supplied Trace X with defective TNT. The evidence showed that CIL had tested the TNT before shipping it to Trace X and concluded that the TNT was satisfactory. Even Arens admitted that he had no proof that CIL knew that the TNT was defective when shipped to Trace X. Other than the statement made by Ingham, there is also no evidence indicating that CIL's refusal to replace the TNT was in bad faith. Although the report of Trace X's expert stated that the TNT was defective, CIL's experts disagreed. After analyzing some of the defective Trace X primers, CIL believed that the failures resulted from Trace X's manufacturing process rather than from the TNT used. It was not an abuse of

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3. Trace X Chemical, Inc. v. Gulf Oil Chemical Co., No., 78-5010 (W.D. Ark. 1982), aff'd, 724 F.2d 68 (8th Cir. 1983).

its monopoly power for CIL to rely on the tests run by its own research department and, therefore, refuse to replace the TNT.

In its brief Trace X also lists CIL's alleged monopolistic pricing and the TNT shortages as further examples of anti-competitive, monopolistic conduct. A careful review of the record reveals that the evidence concerning pricing relates to price discrimination. The district court directed a verdict on Trace X's claim of price discrimination under the Robinson-Patman Act, 15 U.S.C. section

13(a) (1982),[4] and Trace X has not appealed from that ruling. Where its purpose or likely effect is to inhibit competition, discriminatory pricing may also constitute a violation of Section 2 of the Sherman Act. L. Sullivan, Antitrust 122 (1979). However, just as the district court found that there was insufficient evidence of a violation of the Robinson-Patman Act,[5] we

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4. 15 U.S.C. section 13(a) provides as follows:

> It shall be unlawful for any person engaged in commerce, ... to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, ... and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly..., or to injure, destroy, or prevent competition....

5. Although the prohibitions of the Robinson-Patman Act are narrower than those contained in section 2 of the Sherman Act, the insufficiency of evidence precludes a finding of violation under both Acts.

conclude that there is insufficient evidence as a matter of law to sustain the jury's finding of a violation under the Sherman Act.

In addition to its allegations of price discrimination, Trace X contends that CIL's prices in the United States for TNT were too high, thus reflecting monopolistic pricing. However, setting a high price is not in itself anti-competitive. Berkey Photo, 603 F.2d at 294. See 3 P. Areeda & D. Turner, Antitrust Law, 41-42, 148 (1978). Section 2 does not forbid a monopolist to set profit-maximizing prices. L. Sullivan, supra, at 116. Such conduct is not the exclusionary conduct that violates the antitrust laws, but rather is "the normal, rationale response of a business... seeking to maximize profits, sales or revenues." Id. at 100.

Trace X's claim that the TNT shortages

were induced by CIL as a means of market control also must fail. There is insufficiente evidence in the record from which a jury could reasonably conclude that the shortages were other than real. The documents relating to TNT shortages simply show that there were times when CIL was unable to supply all of its customers' demands.

IV.

To further support its claims, Trace X relied on CIL's anti-competitive intent. Trace X's evidence of CIL's intent is its evidence regarding statements made by representatives of CIL. According to Arens and Szaloszi of Trace X, in March, 1977, when they asked CIL to replace the defective TNT, Ingham of CIL responded, "Why would we do that? If we exchange the TNT, you will just use your profits to compete against us in the manufacture of

TNT." Szaloczi also testified that Heddle, CIL's export sales manager, had told him that "Trace X would have a lot better time at the meeting tomorrow if CIL had some understanding that Trace X was going to be raising its prices and not going into the manufacture of TNT." Even if it is assumed that proof of these statements supports an inference of anti-competitive intent on the part of CIL,[6] this is not enough to transform CIL's otherwise legitimate business activities into anti-competitive, monopolistic conduct. See, Telex Corp., 510 F.2d at 925-28. Evidence of anti-competitive intent alone is not enough; anti-competitive conduct or use of monopoly power must also be shown to prove

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5. In Agrashall, Inc. v.. Hammons Products Co., 479 F.2d 269, 285 (8th Cir.), cert. denied, 414 U.S. 1022 (1973), this Court indicated a hesitancy to infer anti-competitive intent solely from the hearsay testimony of an interested witness.

a violation of Section 2 of the Sherman Act. See Cal. Computer Products v. IBM, 613 F.2d 727, 745 n.32 (9th Cir. 1979) (regardless of intent, Section 2 condemns only the monopolist's use of monopoly power); Telex Corp., 510 F.2d at 925-26; Inglis, 668 F.2d at 1028 (direct evidence of intent alone, without corroborating evidence of conduct cannot sustain a claim of attempted monopolization); Buffalo Courier-Exp. v. Buffalo Evening News, 601 F.2d 48, 54 (2d Cir. 1979); Hayes v. Solomon, 597 F.2d 958, 977 (5th Cir. 1979), cert. denied, 444 U.S. 1078 (1980) (a manifestation of intent to triumph in the competitive market, in the absence of unfair, anti-competitive or predatory conduct is not enough to establish an antitrust violation.)

Although we are reluctant to overturn a jury finding, we conclude that there was insufficient evidence as a matter of law to

support the jury's verdict.[7] Therefore, we reverse the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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7. Due to our resolution of the case on the ground of insufficiency of evidence as a matter of law, we do not reach the other issues on which CIL appealed.

Appendix B

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF ARKANSAS

FAYETTEVILLE DIVISION

TRACE X CHEMICAL, INC.
PLAINTIFF

VS. NO. 81-5013

C.I.L., INC. AND
C.I.L., AMMUNITION, INC.,
ET AL.
DEFENDANTS

ORDER

Defendants have filed a motion for a judgment notwithstanding the verdict or, in the alternative, a motion for a new trial in this antitrust case. The trial of this case resulted in a jury verdict in favor of plaintiff in the amount of $500,000.00 on March 8, 1983.

If this case had been tried nonjury,

the Court would not have reached the same verdict. This is not, however, the test for granting a judgment notwithstanding the verdict. The test, as set forth in Ideal Plumbing Co. v. Benco, Inc., 382 F.Supp. 1161 (W.D. Ark. 1974), aff'd. 529 F.2d 972 (8th Cir. 1976) is that the Court is to make a "considered evaluation of the record" and "'test the evidence by a standard asking whether reasonable men might find that the facts amounted to a Sherman Act violation.'". Defendants have not met this test.

There is no need to recount the evidence which supports the jury's verdict. The arguments raised by defendants present fact and credibility questions which were properly addressed to the jury and which were resolved against the defendants. The motion for a judgment notwithstanding the verdict is denied.

Defendants have raised various arguments concerning the admissibility of certain evidence. At the trial of this case, the Court considered defendants' objections before admitting the evidence and no reasons have been advanced for changing those rulings at this time. The motion for a new trial is denied.

Plaintiffs have moved the Court to amend the judgment which was entered on March 8, 1983, to include treble damages. Title 15, U.S.C. section 15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee.

Accordingly, it is ordered that the

judgment be amended as follows: Plaintiff, Trace X. Chemical, Inc., shall have and recover from the defendants, C.I.L. Ammunition, Inc. and C.I.L., Inc., jointly and severally, the sum of $1,500,000.00, together with reasonable attorneys' fees and costs expended.

This judgment shall bear interest at the rate of 8.99 percent per annum from March 8, 1983, until satisfied.

The Court has taken plaintiff's application for attorneys' fees under advisement and will make a ruling in the near future.

Dated June 3, 1983.

WILLIAM R. OVERTON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF ARKANSAS

FAYETTEVILLE DIVISION

'RACE X CHEMICAL, INC.
PLAINTIFF

'S. NO. 81-5013

.I.L., INC. AND
.I.L., AMMUNITION, INC.,
T AL.
DEFENDANTS

JUDGMENT

n accordance with the Order of this Court ntered on this 6th day of June, 1983, it s ordered that plaintiff, Trace X hemical, Inc., have and recover from the efendants, C.I.L. Ammunition, Inc. and .I.L., Inc., jointly and severally, the um of $70,990.00 as a reasonable ttorneys' fee in this case.

This judgment shall bear interest at he rate of 8.72% per annum from this date

until satisfied.

Dated this June 8, 1983.

WILLIAM R. OVERTON

UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 83-1847-WA September Term, 1984

Trace X Chemical, Inc., etc., et al,
Appellees,

Appeal from the United States District Court for the Western District of Arkansas.

vs.

Canadian Industries, Ltd., et al,
Appellants.

The petition of appellee, Trace X Chemical, Inc., for rehearing en banc has been considered by the Court and is hereby denied.

August 16, 1984

Appendix D

15 U.S.C.Section 1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing herein contained shall render illegall, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or

public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under Section 5, as amended and supplemented of the act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914 [15 USCS Section 45]: Provided further, That the preceding proviso shall not make lawful any contract or agreement providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or

conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. 15 U.S.C. Section 1

Appendix E

15 U.S.C. Section 2

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several Stes, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." 15 U.S.C. section 2

Appendix F

15 U.S.C. Section 15

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. section 15

Appendix G

15 U.S.C. Section 17

"The labor of a human being is not a commodity or article o commerce. Nothing contained in the antitrust trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 15 U.S.C. section 17

Appendix H

7 U.S.C. Section 291

"Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporation or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: Provided, however, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First: That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second: That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non- members to an amount greater in value than such as are handled by it for members. 7 U.S.C. Section 291.

Appendix I

Federal Rule of Evidence No. 801(d)(2)

(d) Statements which are not hearsay.- A statement is not hearsay if-

(2) Admission by party-opponent.- The statement is offered by a party and is (a) his own statement, in either his individual or a representative capacity or (b) a statement of which he has manifested his adoption or belief in its trust, or (c) a statement by a person authorized by him to make a statement concerning the subject, or (d) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (e) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. Rule 801(d)(2)

Supreme Court, U.S.
FILED
DEC 19 1984
ALEXANDER L. STEVAS
CLERK

No. 84-796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TRACE X CHEMICAL, INC. and JOHN F. ARENS,

Petitioners,

—v.—

CANADIAN INDUSTRIES, LTD.,
C.I.L. AMMUNITION, INC.,
I.C.I. AMERICA, INC.
and IMPERIAL CHEMICAL INDUSTRIES, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1984

No. 84-796

TRACE X CHEMICAL, INC. and JOHN F. ARENS,

Petitioners,

—v.—

CANADIAN INDUSTRIES, LTD., C.I.L. AMMUNITION, INC., I.C.I. AMERICA, INC. and IMPERIAL CHEMICAL INDUSTRIES, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This brief is respectfully submitted by respondents Canadian Industries Ltd., now known as C-I-L Inc., and CIL Ammunition Inc. (collectively, "CIL") in opposition to the petition for a writ of certiorari filed by Trace X Chemical, Inc. ("Trace X").

Statement of the Case

A. Trace X's Position

CIL is the only commercial producer in North America of the explosive trinitrotoluene ("TNT"). Trace X purchased large amounts of TNT from CIL and used the TNT to make explosive primers. According to Trace X's petition:

1. Trace X, because of its concern over the availability, quality and price of TNT, "purchased the necessary manufacturing equipment to compete with CIL as a TNT manufacturer" (Pet. 15-16; *see also* Pet. 4). This act, according to Trace X, provided CIL with an incentive to drive Trace X out of business (*see* Pet. 8, 12).

2. After learning of Trace X's plan to enter the TNT manufacturing business, and "for no revealed reason," CIL cancelled all credit terms and required cash in advance from Trace X (Pet. 5).

3. CIL also "shipped over 107,000 pounds of defective TNT to Trace X" and refused to replace that TNT even though CIL had "received notice that other customers thought that the TNT was defective and a CIL employee admitted that in CIL's own tests, the TNT failed to meet specifications" (Pet. 6).

4. CIL announced to Trace X that "the substandard TNT would not be replaced because CIL wanted to eliminate Trace X as a probable threat to its North American TNT monopoly" (Pet. 8).

5. CIL's denial of credit to Trace X, and its failure to replace the allegedly defective TNT, had "the expected anticompetitive result of putting Trace X out of business" (Pet. 12).

Based on these facts, according to Trace X, (a) the jury properly found CIL liable for monopolization and (b) the Court of Appeals improperly reversed for want of sufficient evidence to support the verdict. Trace X is wrong as a matter of fact and as a matter of law; the case presents no issues that merit the granting of a writ of certiorari; and the issue raised by Trace X is not properly before this Court.

B. The Facts of Record

The Court of Appeals based its ruling upon a careful analysis of the undisputed facts of record. CIL's response to Trace X's petition is based upon the facts set forth in the Court of Appeals' opinion, which is reproduced at pages 35-60 of the petition. To the extent that we include additional undisputed facts, we have documented them by citation to the joint appendix ("JA") filed with the Court of Appeals.

1. As a significant user of TNT, Trace X became interested in manufacturing TNT as an alternative to purchasing most of its requirements from CIL (Pet. 38). In February of 1976, Trace X's president contacted CIL about its patented, continuous-process method for making TNT, and CIL offered to license its process at a cost of $3,500,000 (Pet. 38-39). Instead, in late 1976, Trace X's president purchased the equipment and blueprints for a mothballed military batch-process TNT plant in Childersburg, Alabama (Pet. 39). He planned to reconstruct the plant in Arkansas and operate it there (*ibid.*).

Trace X's investment in the mothballed equipment and blueprints was only $24,500, as against what Trace X estimated as a $2,000,000 cost for the entire TNT manufacturing project (JA 108-12). In order to raise the money for the project, Trace X prepared a prospectus for potential investors (Pet. 39). By March of 1977, when Trace X shut down its primer business and abandoned the TNT manufacturing project, it had commitments for investment only from its president and vice president (Pet. 39).* No contracts or commitments had been made by any customer other than Trace X itself (Pet. 39).

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* The pledge of Trace X's president, who was in bankruptcy, amounted to $150,000; the vice president's pledge was for an amount that remained unspecified even at trial (JA 112-14, 347-50).

2. Despite its knowledge of Trace X's desire to manufacture TNT, and despite shortages of TNT, CIL's sales to Trace X "increased steadily" from April through September of 1976 (Pet. 38-39, 56-57). By the end of that period, Trace X owed CIL $160,000 for the TNT it had received—an amount far in excess of Trace X's $16,000 credit limit (Pet. 39-40, 51 n.2). At a meeting in October 1976, CIL gave Trace X ten weeks to pay the $160,000, agreed to continue supplying Trace X and reaffirmed its commitment to supply all of Trace X's TNT requirements, subject to availability (Pet. 40, 51). In February 1977, CIL gave Trace X the further written assurance that it would supply 100,000 pounds of TNT per week thereafter (Pet. 41).*

After Trace X had run up the $160,000 bill, however, CIL refused to extend it any further credit (Pet. 40-42). It based this decision on Trace X's having exceeded its $16,000 credit limit and on "uncontradicted evidence that[:]

> "[a.] Trace X's parent company was in bankruptcy. . . .
>
> "[b.] Trace X had refused to supply Dun & Bradstreet with financial information. . . .
>
> "[c.] Trace X's auditors declined to give an opinion on Trace X's 1976 statement of earnings. . . .
>
> "[d.] Trace X had been unable to secure credit from other sources" (Pet. 49-50).**

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* Trace X's TNT purchases from CIL were only 1.7 million pounds for the entire year 1976 (JA 1382).

** Trace X also had an explosion at its plant in December 1976 and ceased production for 45 days (JA 365-66, 1386).

As the Court of Appeals concluded:

> "CIL's denial of credit to Trace X under these circumstances cannot be considered an unlawful use of monopoly power" (Pet. 50).
>
> "On the basis of the evidence presented, CIL's refusal to extend credit did not amount to unreasonable anti-competitive conduct, but rather constituted a valid exercise of business judgment" (*ibid.*).

3. Trace X also complains that in August 1976, CIL provided it with 107,000 pounds of allegedly defective TNT, which CIL later failed to replace (Pet. 6-8). The facts are as follows:

a. CIL tested the TNT before shipping it to Trace X and concluded that the TNT was satisfactory (Pet. 53). Trace X's president admitted that he had no proof that CIL knew that the TNT was defective when shipped to Trace X (*ibid.*). As the Court of Appeals stated, "[T]here is no evidence in the record to support Trace X's suggestion that CIL deliberately supplied Trace X with defective TNT" (*ibid.*).

b. In September 1976, some of Trace X's customers complained that primers supplied by Trace X were misfiring (Pet. 41). Trace X sent some of the primers to CIL and claimed that the defect lay in the TNT that CIL had supplied for the primers (Pet. 41, 53). CIL's experts analyzed the primers, concluded that the TNT was not defective, and further concluded that the failures resulted from Trace X's manufacturing process rather than from the TNT supplied by CIL (Pet. 53). The Court of Appeals held that "[i]t was not an abuse of its monopoly power for CIL to rely on the tests run by its own research depart-

ment and, therefore, refuse to replace the TNT" (Pet. 53-54).*

4. Trace X claims that CIL's denial of credit and refusal to replace the TNT were all effected with anticompetitive intent. As evidence, Trace X points to an alleged statement by CIL at a meeting in late March of 1977, when Trace X asked CIL to replace the TNT. According to Trace X's president, a CIL marketing manager replied, "Why would we do that? If we exchange the TNT, you will just use your profits to compete against us in the manufacture of TNT" (Pet. 42, 53, 57-58).** CIL's marketing manager and the other CIL representative at the meeting denied that any such statement had ever been made; indeed, CIL never took Trace X's manufacturing project seriously (JA 674, 764, 1023).

5. Even assuming that CIL made the statement attributed to it, that statement would not support any reasonable inference that CIL's denial of credit and failure to replace the allegedly defective TNT were improper or "had the expected anticompetitive effect of putting Trace X out of

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* Contrary to Trace X's suggestion (Pet. 6), there was no evidence that customers other than Trace X thought CIL's TNT to be defective, and there was no evidence that CIL's tests in 1976 or 1977 showed the TNT to be defective. All of the evidence was to the contrary (JA 758, 759, 1320-21, 1385).

Trace X's reference to CIL's testing (Pet. 6) is apparently to a statement by an outside consultant retained by CIL for the trial in 1982 of a breach of warranty action brought by Trace X regarding the allegedly defective TNT. Trace X won a jury verdict in that trial, in part on the basis of the consultant's testimony, in cross-examination by Trace X, that some of the TNT had failed to meet certain military specifications which CIL contended were irrelevant to Trace X's commercial use (*see* Pet. 52-53; JA 760, 766-67, 1260-61). CIL's contemporaneous tests in 1976 and 1977 had shown that the TNT met Trace X's specifications (JA 1320, 1385).

** Trace X's vice president testified to a similar statement that he attributed to another CIL employee (Pet. 58).

business" (Pet. 12). CIL's actions in supplying Trace X with ever-increasing amounts of TNT despite shortage conditions, and in providing Trace X with written assurance of future supplies, are inconsistent with the claim that CIL wanted to drive Trace X out of business:

> —CIL took extraordinary steps to obtain the TNT that Trace X needed—steps that included soliciting other CIL customers for supplies and purchasing TNT from abroad (JA 742-45).
>
> —CIL delivered approximately 1.7 million pounds of TNT to Trace X in 1976, when it knew of Trace X's TNT manufacturing project. This was six times as much as the 280,000 pounds it delivered to Trace X in 1975 and more than forty times as much as the 40,000 pounds it delivered in 1974 (*see* JA 1382).
>
> —In February 1977, CIL gave Trace X written assurance that it would supply up to 100,000 pounds a week (Pet. 41), *i.e.*, over 5 million pounds a year.

In short, CIL worked hard to develop Trace X as a customer both before and after CIL knew about Trace X's TNT manufacturing project. Nevertheless, CIL was unwilling to provide credit because Trace X was patently uncreditworthy, and CIL was unwilling to provide replacement TNT free of charge because its own technical experts believed on the basis of two sets of tests that the original TNT had been satisfactory and had met Trace X's specifications.

Although Trace X tries to blame CIL for its failure, the cause of the failure is simple and not at all sinister. Trace X's own evidence showed that it was never able to obtain the financing necessary to support the TNT manufacturing project (Pet. 39; JA 112-13); that it had never had adequate financing even for its primer business (JA 585); that

it had made little money on its primer business through September 1976, even on the basis of financial statements that its auditors refused to certify (JA 1006-16; *see* Pet. 50); that it had had an explosion at its plant and had shut down for six weeks in December 1976 and January 1977 (JA 365-66, 1386); and that it needed business so badly, in early 1977, that it deliberately sent to a major customer a shipment of primers that had failed the Trace X quality control test (JA 719-20). By March 1977, Trace X reached the perhaps-inevitable conclusion that it had to close down. The present lawsuit represents Trace X's efforts to shift the blame for its failure to CIL, its principal supplier.

Summary of Argument

Trace X's petition should be denied for two principal reasons:

First, the issue presented by Trace X's petition is not properly before this Court. The Court of Appeals based its opinion on the principle that a company with monopoly power may be held liable under Section 2 of the Sherman Act only if it engages in "anti-competitive" conduct. That principle was clearly set forth in the charge to the jury, which Trace X accepted without objection. Trace X should not be permitted to challenge in this Court a legal principle that it accepted in the charge to the jury.

Second, the opinion of the Court of Appeals is entirely consistent with the prior decisions of this Court and of the other courts of appeals. This Court and the lower courts have consistently required proof of anticompetitive conduct —*e.g.*, conduct that by its very nature establishes barriers to competition—to support charges of monopolization. As the court below found, there was no evidence of such anti-

competitive conduct in the present case. CIL simply denied credit to an uncreditworthy customer and refused to provide that customer with a free replacement for TNT that had tested out satisfactorily on two occasions—before shipment and after Trace X claimed that it was defective. Such straightforward, objectively-justified commercial decisions do not constitute unlawful monopolization.

ARGUMENT

A. The Issue Presented by Trace X Is Not Properly Before This Court

Trace X seeks to have this Court rule upon the following question:

> "*whether specific,* 'predatory' or 'unlawful' *anticompetitive conduct is required* to make out a violation of section 2 under the Sherman Act' (Pet. i) (emphasis added).

That issue is not properly before the Court. The case was presented to the jury on a charge, which Trace X accepted (JA 790), that included the following language:

> To establish monopolization, Trace X must prove that "they [CIL] have to willfully go out and take anticompetitive action to drive or keep people out of the market" (JA 809).
>
> To establish attempted monopolization, Trace X must prove that CIL engaged in "some anticompetitive or exclusionary conduct done in furtherance of that purpose or intent [to monopolize]" (JA 809).
>
> "Conduct which involves *business practices that are customary and legitimate in the field,* the introduction of superior product, *the exercise of business judgment,* or conduct reasonably responding to competition *can-*

not be found to be anticompetitive or exclusionary" (JA 810) (emphasis added).

As the Court of Appeals pointed out, the "general principles" on which it based its opinion—and in particular the element of anticompetitive conduct—"were outlined in the district court's charge to the jury" (Pet. 46-47, 49). If Trace X believed that the charge was improper, it should have objected at the time the charge was given. Trace X did not do so; it never suggested to the District Court that the charge was improper. In effect, Trace X is attempting in its petition for certiorari to attack a charge and a legal principle that it agreed to at trial. For this threshold reason, Trace X's petition should be denied.*

Trace X also appears to suggest that CIL acquired its monopoly position unlawfully (Pet. 20). That issue is not appropriately before the Court because it is purely a factual issue that is beyond the scope of the issue presented by Trace X. In any event, the only evidence on the subject indicated that CIL emerged with monopoly power because its competition abandoned the TNT business (a declining business) in view of (a) inroads made by newer explosives, and (b) environmental problems associated with the production of TNT (JA 738-40).

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* Federal Rule of Civil Procedure 51 states that "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." This Court will disregard the "uncompromising language" of Rule 51 only in extraordinary circumstances. *See Newport* v. *Fact Concerts*, 453 U.S. 247, 255 (1981) (opinion of the Court); *id.* at 274-75 (Brennan, J., dissenting). No such circumstances are presented by Trace X's petition.

B. There Is No Conflict Between the Court of Appeals Opinion and Prior Decisions of This Court or of Other Circuit Courts

To the extent that the charge to the jury and the opinion below differed, the opinion below was more favorable to Trace X than the charge. The fundamental principle underlying the Court of Appeals' decision was the following:

> "To prove a violation of Section 2 under the Sherman Act, whether based on a claim of attempted monopolization or actual monopolization, it must be shown that CIL engaged in anti-competitive behavior" (Pet. 46).

Since there was "insufficient evidence as a matter of law" to support a finding of anticompetitive conduct (Pet. 49), the Court of Appeals overturned the District Court's judgment against CIL.

Trace X asserts that this ruling was inconsistent with a series of cases (decided by this Court and various courts of appeals) which involved inherently exclusionary practices, *i.e.*, practices that by their nature establish barriers to competition. The cases hold that such practices may be prohibited even if they fall short of being "manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition" (*United States* v. *Aluminum Co. of America*, 148 F.2d 416, 431 (2d Cir. 1945)); and that monopolization may be found despite the lack of "predatory practices" or otherwise unlawful actions (*Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 496-99 (1968); *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946)). In the cases cited above, the following exclusionary practices, among others, were found to be unlawful when engaged in by corporations with monopoly power: developing production overcapacity with the purpose of forestalling others from entering the market (*Alcoa, supra*, 148 F.2d at 430, 431); offering essential manufacturing

equipment only on the basis of ten-year leases with provisions that had a "special deterrent effect" on customers' using competitive products (*Hanover Shoe, supra,* 392 U.S. at 507-08); conspiring to buy up the supply of cheap tobacco in order to preclude manufacturers of cheap cigarettes from getting the tobacco necessary for their production, conspiring to sell major brand cigarettes at a loss for a short period of time in order to curtail the market inroads being made by cheaper brands, and conspiring to coerce dealers to resell the cheaper brands at only three cents less than the conspirators' major brands (*American Tobacco, supra,* 328 U.S. at 803-04, 806-08). Some of these practices might have been lawful if undertaken by companies that lacked monopoly power, and some may not have had the effect of completely excluding competition (*see Hanover Shoe, supra,* 392 U.S. at 496), but all were held unlawful when undertaken by monopolies.

There is no conflict between the foregoing decisions and the decision below. CIL's conduct was not, like a long-term lease with restrictive provisions, inherently exclusionary. What CIL did was (a) to deny credit to a patently uncreditworthy customer—a customer that could not get credit from its own bank (JA 1019; Pet. 50); and (b) to accept the conclusions of its own experts, who tested the allegedly defective TNT before shipment and after Trace X's primers had failed, rather than accede to the request of a disgruntled customer. We are aware of no appellate ruling that would prohibit a company with monopoly power from making such ordinary and objectively-justified commercial decisions, even if the decisions had an adverse effect on potential or actual competitors.*

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* We note that a creditworthy Trace X would not have been troubled by CIL's denial of credit or its refusal to provide free replacement TNT. If Trace X had been financially sound, it would have been able to obtain credit through other channels.

Trace X tries to create a conflict between the court below and this Court by asserting that the court below "required petitioner to show specific '*predatory or unlawful anti-competitive conduct*'" (Pet. 13) (emphasis added). The court below imposed no such requirement; the purported quotation does not exist. The court was careful to require, as a prerequisite to liability, only a showing of "anti-competitive" conduct (Pet. 46)—*not* a showing of predatory conduct (defined by Webster as "characterized by plundering, robbing, or exploiting others") and *not* a showing of otherwise-unlawful conduct.

Trace X also appears to suggest (Pet. 18) that the opinion below is inconsistent with this Court's holding, in *United States* v. *Griffith*, 334 U.S. 100, 107 (1948), that "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."* *See also Alcoa, supra*, 148 F.2d at 432, cited at Pet. 22. As the court below found, CIL's decisions regarding credit and replacement of the TNT did not in any way stem from or constitute a use of monopoly power; they were commercial decisions of the kind that every supplier makes in the ordinary course of its business (*see* Pet. 49, 50, 52-54). *Griffith* is inapplicable.

Finally, Trace X suggests that the opinion below conflicts with decisions in the Second, Ninth, Tenth and District of Columbia Circuits (Pet. 21). In fact, the court below cited to and applied decisions in the Second, Ninth and Tenth Circuits among others (Pet. 44-52) and never indicated any disagreement with any ruling of any other

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* In *Griffith*, four theater companies were held to have unlawfully used their monopoly power in one-theater towns to negotiate exhibition contracts that also covered towns in which competition existed.

circuit. The appellate decisions cited by Trace X simply apply the principles established by this Court in the cases discussed herein and are entirely consistent with the decision below.

The latter point is confirmed by a review of the two cases most heavily relied upon by Trace X (Pet. 26-30). In *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978), the court carefully examined each of the allegedly anticompetitive practices and held that a prima facie case of monopolization was made out only by those that "unnecessarily, even deliberately, excluded leasing companies from an opportunity to compete." 559 F.2d at 499-502. The court referred to these actions as "exclusionary sales tactics to maintain [IBM's] monopoly power in the lease market." *Id.* at 503. *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), like *Alcoa, Hanover Shoe* and *American Tobacco*, involved the maintenance of monopoly power through inherently exclusionary conduct. The conduct in *Hecht* was the imposition by the Washington Redskins of a clause, in the Redskins' 30-year lease of RFK Stadium, that precluded the owners from renting the stadium to any other professional football team. 570 F.2d at 985. That clause effectively precluded any football team other than the Redskins from playing in Washington, since RFK Stadium was allegedly the only stadium in the Washington metropolitan area suitable for professional football. *Id.* at 985-86.

C. Policy Considerations

As the Court of Appeals pointed out, " 'Section 2 of the Sherman Act does not give purchasers the exclusive right to dictate the terms on which they will deal' . . . nor does

it require a monopolist to accede to every demand of its competitors or customers" (Pet. 51-52). If Trace X's analysis were adopted by this Court, however, a company with monopoly power could be subject to liability every time it undertook an action that might damage a competitor or even a potential competitor, assuming that the plaintiff could generate some evidence of anticompetitive intent.* Thus, a company with monopoly power could be found liable if it cut its price (while still making a profit) to meet a competitor's price, if there was evidence that the price cut was intended to take business away from the competitor. Such a result would discourage rather than foster healthy competition. Similarly, a monopoly that offered to sell components to a potential competitor could be subject to liability if it insisted, in accordance with ordinary commercial practice but for allegedly anticompetitive reasons, that the potential competitor purchase in truck-load lots or take delivery at the manufacturer's plant or absorb the cost of insurance. To make such day-to-day decisions actionable would give to juries a virtually free rein to set standards of conduct for companies that possess monopoly power, however innocently that monopoly power may have been achieved.

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* That evidence could be as thin as in the present case, where Trace X's officers claimed that CIL made oral statements of anticompetitive intent—statements that were inconsistent with CIL's conduct, contemporaneous documentation and trial testimony.

CONCLUSION

Nothing in the facts of the present case warrants this Court's attention. The legal principle on which the case turned was subsumed within a jury charge that petitioner accepted, and in any event was entirely consistent with prior decisions of this Court and the various courts of appeals. For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals for the Eighth Circuit should be denied.

Dated: New York, New York
December 18, 1984

Respectfully submitted,

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APPENDIX

C-I-L Inc.

Rule 28 Listing of Parents, Subsidiaries and Affiliates

Ultimate Parent:

Imperial Chemical Industries PLC

Immediate Parent:

Imperial Chemical Industries of Canada Ltd.

Subsidiaries and Affiliates (Except Wholly Owned Subsidiaries):

Agrocentre Farnham Inc.
Agrocentre St. Hyacinthe Inc.
Agrocentre St. Pie Inc.
Agrocentre St. Remi Inc.
Alchem Inc.
BAPCO
Barkey Agromart Ltd.
Bay Industries Ltd.
Bluewater Agromart Limited
Boyes Explosives (Eastern) Limited
Brussels Agromart Ltd.
BXL Bulk Explosives Limited
CXA Ltd./CXA Ltee
Canadian "Mud Lab" Chemical and Manufacturing Co. Ltd.
Canso Chemicals Limited
Cardinal Farm Supply Limited
MoDo Chemetics Do Brazil
MoDo Chemetics AB
Cornwall Chemicals Limited
East-Chem. Inc.
Expro Chemical Products Inc.

Fingal Farm Supply Limited
Grand Falls Agromart Ltd./
Agrocentre Grand Falls Ltee
Grand River Farm Supply Limited
Hartland Agromart Ltd.
Harvex Agromart Inc.
Hoegy's Farm Supply Limited
Jarvis Clark de Mexico S.A. de C.V.
Jarvis Clark Pty. Limited
Les Engrais Chimiques Y. Roy Inc.
Les Engrais Lanaudiere Inc.
Les Explosifs Chretien
Longwood Agromart Limited
Malpeque Fertilizers Ltd.
Maple Farm Supply Limited
Max Underhill's Farm Supply Limited
Munro Fertilizers Ltd.
National Mud Control Laboratories
Oxford Agropro Ltd.
Scotland Agromart Ltd.
Setterington's Fertilizer Service Limited
SOPEC
Sprucedale Agromart Limited
Tri-County Agromart Ltd.
Tricil Limited—Tricil Limitee
West African Explosives & Chemicals Ltd.
Westisle Farm Supply Ltd.